TABLE OF CONTENTS.

PETITION FOR A WRIT OF CERTIORARI 1

Statement of Jurisdiction 1

Opinions Below 2

Statement of Matters Involved 2

Questions Presented 3

Reasons for Allowance of the Writ 4

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 5

Statutes Involved 5

Statement of Facts 6

Argument 8

Conclusion 12

TABLE OF AUTHORITIES.

Cases.

Berger vs. United States, 295 U. S. 78 ..... 3, 4, 11, 12

Goldstein vs. United States, 316 U. S. 114, 62 St. Ct. 1000, 86 L. Ed. 1312 ..... 9, 10

Nardone vs. United States, 302 U. S. 379 ..... 9, 10

Nardone vs. United States, 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307 9

Nero (Noro) vs. United States, 148 F. 2d 696 9

Silverthorne Lumber Co. vs. United States, 251 U. S. 385 ..... 9, 10

United States vs. Coplon, 72 S. Ct. 362, 342 U. S. 920, 96 L. Ed. 690 10

United States vs. Coplon, C. A. N. Y. 1950, 185 F. 2d 629 10

Statutes and Rules.

18 U. S. C., Sec. 2071 ----------3, 4, 5, 9, 10, 11

18 U. S. C., Sec. 2113 (a) and (d) ----------1, 2, 5

28 U. S. C., Sec. 1254 (1) ---------- 1

Federal Rules of Criminal Procedure:

Rule 37 (b) (2) ---------- 2

Rule 45 (a) ---------- 2

In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1953.

JOSEPH JOHN SANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Petitioner, Joseph John Sanzo, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, insofar as it affirmed petitioner's conviction in the United States District Court for the Eastern Division of the Northern District of Ohio, on charges of bank robbery in violation of Title 18, U. S. C., Section 2113 (a) and (d).

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254 (1).

The judgment of the Court of Appeals was entered on February 12, 1954 (R. p. 215a).* On March 5, 1954, by order of Honorable Stanley Reed, Associate Justice of

* ("R" refers to pages of the Record.)

this Court, petitioner's application for extension of time in which to file a petition for a writ of certiorari was extended to, and including April 13, 1954. This petition was filed within that period in accordance with Rule 37 (b) (2) and Rule 45 (a), F. R. Crim. P.

On March 9, 1954, the United States Court of Appeals for the Sixth Circuit entered an order staying mandate in this cause thirty days and providing further that if application for writ of certiorari be filed in this Court within said thirty days, said stay of mandate shall operate until the final disposition of this cause by this Court.

OPINIONS BELOW.

The opinion of the Court of Appeals, Simons, Chief Judge; Allen and Martin, Circuit Judges, has not yet been reported and is printed in the record at pages 217a to 223a, inclusive. Pertinent excerpts from proceedings in the District Court on motion for new trial are set forth in the Record at pages 206a and 207a.

STATEMENT OF MATTERS INVOLVED.

Petitioner and a co-defendant Julius Anthony Petro were convicted in the United States District Court for the Northern District of Ohio, Eastern Division on a one count indictment charging violation of Title 18, U. S. C. Section 2113 (a) (d).

The indictment specified that on August 14, 1952, the defendants by force, violence and intimidation took from the person of Charles J. Foley, the sum of $71,000.00, the property of the Union Savings and Trust Co. of Warren, Ohio; that the deposits of the Union Savings and Trust Co. were insured by the Federal Deposit Insurance Corporation and in committing said offense, the defendants did put in jeopardy the life of Charles J. Foley by the use of a sawed-off shotgun and a revolver.

During an overnight adjournment of the trial on December 8, 1952, a medical record brought in by subpoena issued on application of petitioner and received in evidence as Government's Exhibit 31, was taken from the custody of the Court and transported to Washington, D. C. by a Special Agent of the Federal Bureau of Investigation under the direction of an Assistant United States Attorney, without knowledge to opposing counsel and without application to or authority of the Court.

On the following day, December 9, 1952, the Government offered evidence which it had obtained under the unauthorized removal of the Exhibit and its transportation to Washington, D. C., beyond the jurisdiction of the court, and, over objection of the petitioner, the Government was permitted to introduce said evidence. The co-defendant below, Julius Anthony Petro, who is not involved in this proceeding was sentenced to imprisonment for 25 years and the petitioner to imprisonment for 15 years. On separate appeal, the causes were consolidated and the judgment of conviction as to both defendants was affirmed.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that notwithstanding the removal of Government's Exhibit 31 from the custody of the court was improper (Title 18, U. S. C. Sect. 2071) evidence obtained by agents of the United States thereunder was admissible, because no general objection to said evidence was made, whereas the record shows that objection was, in fact, made.

2. Whether the removal of Government's Exhibit 31 under the circumstances shown by the record constituted misconduct by the Assistant United States Attorney, under the doctrine of *Berger vs. United States*, 295 U. S. 78.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision of the Court of Appeals holding that the removal of Government's Exhibit 31 from the custody of the trial court, and sending it out of the jurisdiction without application to and approval by the Court, although improper (18 U. S. C. 2071), was not prejudicial, and the failure of the Court of Appeals to apply the doctrine of *Berger vs. United States*, 295 U. S. 78, has decided an important question of federal law, which has not been, but should be, decided by this Court.

2. The decision of the Court of Appeals holding that evidence obtained by agents of the United States, as the result of the improper and unauthorized removal of Government's Exhibit 31, was admissible in evidence because there was no general objection to it, is based upon the erroneous conclusion that there was no objection to the testimony, whereas the record shows otherwise.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the proceedings of that Court herein, being the case numbered 11871 and entitled on its docket as "Joseph John Sanzo, Appellant vs. United States of America, Appellee" and that the judgment of that court be reviewed by this Court, and for such other relief as this Court may deem proper.

JOSEPH JOHN SANZO, *Petitioner*,

By MICHAEL A. PICCIANO,

Attorney for Petitioner.

Dated March 26, 1954.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATUTES INVOLVED.

Title 18, U. S. C., Section 2113 (a) and (d) on August 14, 1952, the date of the alleged robbery and also the date of petitioner's arrest, provided in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) * * * of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

Title 18, U. S. C., Section 2071 (a) on December 8, 1952, the date of the removal of the exhibit, without authority, in the midst of trial, provided in pertinent part:

> (a) Whoever wilfully and unlawfully * * * removes, * * *, or attempts to do so, or, with intent to do so takes and carries away any record, * * *, paper, document or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

STATEMENT OF FACTS.

Government's Exhibit 31 (R. 356a, 357a)* is a medication record of the treatment of petitioner by Dr. Alexander V. Spaeth, beginning on August 12, 1952. Petitioner's defense was alibi. Government's Exhibit 31 was produced in court by the doctor in response to a subpoena *duces tecum* on application of petitioner (R. 3a). The exhibit was identified as Government's Exhibit 31 (R. 152a) and was offered and received in evidence on December 8, 1952, in the midst of trial (R. 153a). The first date appearing on Government's Exhibit 31 is a rubber stamp date showing Aug. 12, 1952 (R. 357a). Immediately following is another rubber stamped date in which the first digit is a "1" immediately followed by a handwritten figure "4" obviously superimposed over another digit, rubber stamped or otherwise, which is not discernible (R. 357a). Dr. Spaeth testified that the original rubber stamped date was Aug. 14, 1952, and that he had written the "4" over the second digit—that the original rubber stamped date was in all probability put on by his daughter who was acting as his secretary at the time (R. 167a). During the overnight adjournment of court on December 8, 1952, Special Agent Walter E. Higgins of the Federal Bureau of Investigation received Government's Exhibit 31 from Mr. Frank Steel, Assistant United States Attorney and took it by plane to Washington, D. C., returning at noon (December 9, 1952) with Special Agent George Mesnig (R. 190a, 191a). Special Agent George Mesnig was offered as a rebuttal witness by the Government and testified that he had received Government Exhibit 31 from Special Agent Higgins in Washington, D. C., the night before (R. 191a); that he took infra-red photographs of the

* "R" refers to pages of the Record.

exhibit in an effort to determine the original date which appeared under the handwritten "4." Before the witness testified as to his findings, objection was interposed by counsel for petitioner (R. 192a). *Notwithstanding this, the Court of Appeals erroneously concluded in its opinion "No general objection was offered to this evidence,* * * *"* (p. 5, Opinion of Court of Appeals, R. 222a). Petitioner's objection, having been overruled, Special Agent Mesnig stated his findings that in his opinion, "the figure which was in the rubber stamp is a round bodied figure, having a definite circle, * * * and resembles the bottom in only two digits, either 6 or 8. And because of the fact that this is a definite curve instead of a straight line upward, I would be inclined to say that this is probably an 8" (R. 194a).

The circumstances surrounding the removal of the exhibit from the custody of the Court, during trial, and its overnight transportation by plane to Washington, D. C. under the direction of the Assistant United States Attorney without authority of Court, and without notice to the court or opposing counsel were not revealed until December 19, 1952, on oral hearing of motion for new trial. At that time, Mr. Frank Steel, Assistant United States Attorney, assumed the responsibility for the removal of the exhibit and sending it to Washington, D. C., without authority of the Court and without notice to opposing counsel (R. 206a). In disposing of petitioner's complaint relative to the improper removal of Government's Exhibit 31, and the admission, over objection, of the evidence obtained as the result of its improper removal, the trial Court, in overruling motion for new trial announced:

> "The Court: * * * I don't think I need spend much time on argument in connection with the withdrawal of Government's Exhibit 31 from the records of the

court,—the fact it was given to Agent Higgins, and the fact he took it to Washington to have it examined by Mr. Mesnig there. *There was no application to the Court to do that. The Court was unaware it was done until the following morning,* * * *. That exhibit was returned the next day, and the withdrawal and return of the exhibit resulted in no prejudice. *The thing that harmed the defendants was the testimony given in connection with it.*" (R. 206a.)

ARGUMENT.

I.

The Court of Appeals (Opinion, p. 5, R. 222a) states "An FBI agent was permitted to testify to the effect that in his opinion, the original figure over which the 4 was superimposed was an 8. *No general objection was offered to this evidence,* * * *." It would seem that the affirmance by the Court of Appeals was based upon this conclusion, which, if correct, would furnish no basis for complaint. However, the record shows the contrary—it definitely shows an objection by counsel for petitioner, immediately following his statement that in order to determine what the rubber stamp numeral was, he took infrared photographs of that portion of the document.

> "I might state that certain different objects reflect infrared radiation differently. For instance, you may have two ink writings which look to the naked eye—
>
> Mr. Picciano: I object to this.
>
> The Court: Overruled. Proceed."

Following the overruling of petitioner's objection, the testimony of Special Agent Mesnig had reference to his findings, based as they were upon his examination of Government's Exhibit 31, which admittedly had been improperly removed from the custody and jurisdiction of the Court.

Title 18, U. S. C., Section 2071 is a penal statute. Under its terms it penalizes concealment, removal, or mutiliation of any record, paper or document filed with any clerk or officer of any United States Court. The term "whoever" is all inclusive. No exception is made exempting from its provisions any agent of the Federal Government. The Court of Appeals having found that the removal of the exhibit was improper, should have reversed petitioner's conviction under the Federal judicial policy that the Government can not utilize the fruits of evidence improperly obtained by its representatives. *Silverthorne Lumber Co. vs. United States,* 251 U. S. 385; *Nardone vs. United States,* 302 U. S. 379; *Nardone vs. United States,* 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307; *Goldstein vs. United States,* 316 U. S. 114, 62 St. Ct. 1000, 86 L. Ed. 1312. Government's Exhibit 31 had already been admitted in evidence before it was improperly removed. Petitioner's objection was not to the exhibit itself, but to its improper removal and to the evidence obtained by agents of the Government as the result of its improper removal. The Court of Appeals, to use its own language (p. 5, Opinion, Court of Appeals, R. 222a), says:

> "* * * but we are cited to no decision which holds that competent evidence removed from the custody of the clerk under the circumstances of this record is not admissible."

Diligent search fails to disclose any reported case where the exact facts at bar were considered. This, therefore, raises an important question of federal law, which has not been, but should be decided by this Court. In his brief, p. 53 in the Court of Appeals, petitioner cited *Nero (Noro) vs. United States,* 148 F. 2d, 696, p. 699 that while neither the constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in prosecution for crime, it is a federal judicial

policy not to allow the agents and officers of the United States to break the law themselves and then use the information so acquired in the prosecution of others.

Whether the withdrawal of the exhibit was improper from the standpoint of fair play, or unlawful under Title 18, U. S. C. 2071, is of little moment. The evidence improperly obtained as the result of its removal, was inadmissible in evidence, and should have been so held. There can be no appreciable difference between evidence improperly obtained by agents of the United States in connection with the unauthorized removal of a court record under the circumstances of this case, and evidence otherwise improperly obtained by federal agents through the medium of wire-tapping or the expediency of unreasonable search and seizure in violation of Constitutional guarantees. The comparatively recent case of *United States vs. Coplon,* C. A. N. Y. 1950, 185 F. 2d, 629 adhered to the policy laid down by this Court in *Silverthorne Lumber Co. vs. U. S. supra; Nardone vs. U. S. supra;* and *Goldstein vs. United States, supra.* In *U. S. vs. Coplon,* 72 S. Ct. 362, 342 U. S. 920, 96 L. Ed. 690, certiorari was denied. Significantly, the improper removal of court records under 18 U. S. C. 2071 is visited with penal consequences, which is not true in "wire-tapping." *A fortiori,* since evidence obtained by "wire-tapping" is not admissible in evidence, it would seem to follow that the rule of exclusion would apply with even greater force under the improper removal of court records deposited in the courts of the United States.

Since the Court of Appeals has held that the removal of the exhibit was improper, and since the record shows an objection to the introduction of testimony obtained (R. 192a) as the result of said improper removal, the conviction of petitioner should have been reversed by the Court of Appeals.

II.

The Court of Appeals erred in affirming the District Court notwithstanding misconduct of the Assistant United States Attorney in the improper removal of Government's Exhibit 31 from the Court Records. Title 18, U. S. C. 2071. Although the Court of Appeals, in its opinion, held that it was improper to send Government's Exhibit 31 out of the jurisdiction without application to and approval by the Court (C. of A. Opinion, p. 5, R. 222a) it failed to apply this Court's decision in *Berger vs. U. S.*, 295 U. S. 78, p. 88, which is clearly applicable at bar:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The exhibit having been offered and received in evidence became the property of the Court, and was not subject to removal from *custodia legis* without application to and authority of the Court.

An exhibit once admitted in evidence in the Courts of the United States belongs to neither party. It is *in custodia legis* and cannot be withdrawn or removed by anyone, for any purpose without application to and approval by the Court. The Court of Appeals having found that the removal of the exhibit was improper, it would

seem to follow: (1) that the improper removal of the exhibit constituted misconduct and called for application by the Court of Appeals of the doctrine in *Berger vs. United States, supra,* and (2) that evidence obtained by agents of the United States as the direct result of the improper removal was inadmissible in evidence, over objection.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. PICCIANO,
Counsel for Petitioner.

March 26, 1954.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Argument	6
Conclusion	11

CITATIONS

Cases:	
Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U. S. 837	10
McGuinn v. *United States*, 191 F. 2d 477	10
Statute and Rule:	
18 U. S. C. 2071 (a)	4
18 U. S. C. 2113 (a), (d)	3
Fed. Rules of Crim. P., Rule 30	9

298382—54

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 662

JOSEPH JOHN SANZO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 537 Misc.

JULIUS ANTHONY PETRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. II–217) [1] is reported at 210 F. 2d 49.

[1] The reference is to Volume II, page 217, of the record in No. 662. The record is contained in two volumes, running from pages 1a to 368a and 1a to 224a, the pagination not being correlated.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1954 (R. II–215). On March 6, 1954, Mr. Justice Reed entered orders extending the time for filing petitions for writs of certiorari to April 13, 1954, with respect to No. 662 and to April 23, 1954, with respect to No. 537 Misc. Sanzo filed his petition on March 29, 1954 and Petro on April 10, 1954. The petitioners were tried together in the District Court and both petitions can conveniently be answered in one brief in opposition. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Both petitioners raise the issue of whether there was reversible error in the admission of expert evidence relating to a Government exhibit received in evidence which was removed by the United States Attorney without the Court's permission and given into F. B. I. custody overnight for laboratory tests.

Petro also raises the following questions:

2. Whether it was error to admit evidence as to the purchase of a cafe by Petro's father where the proof showed that stolen bills were used for part of the deposit.

3. Whether the Court's comments concerning the identification of petitioner Petro constituted reversible error.

4. Whether the admission of a law enforcement officer's testimony as to the procedure in the police line-up and the manner of identification of petitioner Petro by witnesses who viewed the line-up constituted reversible error.

5. Whether the Court's charge as to the reconciliation of the evidence against petitioner Petro with the theory of either innocence or guilt constituted prejudicial error.

6. Whether, where a witness testified that petitioner Petro was with him in the witness' place of business at the time of the robbery there was reversible error in allowing the Government to ask witness why the information had not been given to the police.

STATUTES INVOLVED

18 U. S. C. 2113 (a) and (d) provide in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) * * * of this section, assaults any person, or puts in jeopardy the

life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U. S. C. 2071 (a) provides in pertinent part:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

STATEMENT

Joseph John Sanzo and Julius Anthony Petro were jointly tried and found guilty in the United States District Court for the Northern District of Ohio under an indictment for bank robbery and putting in jeopardy the life of Charles J. Foley, bank manager, in violation of 18 U. S. C. 2113 (a) and (d) (R. I–8). Two motions for new trial by petitioner Sanzo, in the second of which Petro joined, were overruled (R. I–202, 207, 210, 352). Petro was sentenced to 25 years imprisonment (R. I–348) and Sanzo to 15 years (R. I–349). On appeal the judgments were unanimously affirmed (R. II–215). The evidence

pertinent to the issues raised by the petitioners may be summarized as follows:

On August 14, 1952, a shipment of money containing $16,000 in new bills, the serial numbers of which had been recorded, was prepared for removal from the Union Savings and Trust Company of Warren, Ohio to its branch bank in another section of the city (R. I–17, 18, 19, 26–30). Charles J. Foley, branch manager, was carrying this money in his automobile when he was forced to the curb by a car from which two hooded men emerged. They took the money from him at gun point and made their getaway in a gray Oldsmobile (R. I–33–38; R. II–2). A short distance from the holdup scene, Carter Alden and his mother pulled their car aside to avoid the speeding Oldsmobile and had an opportunity to observe the faces of the occupants (R. I–58–59). That night from a group of pictures shown them by an F. B. I. agent, Mrs. Alden picked out pictures of Sanzo and Petro as resembling the occupants and her son picked out a picture of Petro (R. II–32–36). The following day F. B. I. agent Peterson took the Aldens to a police line-up in Cleveland where Mrs. Alden picked both men out of the line-up and her son picked out Petro. Agent Peterson testified as to the manner in which the line-up was conducted (R. II–4, 78–80).

Some of the new money forming part of the robbery loot was deposited in a bank and traced back to the home of petitioner Petro's father who

had used it as a cash deposit given one Schaefer, a broker, in the purchase of a cafe for $46,000 (R. II–135–137). Petro admitted that he took money from and returned it to the family hiding place from which this deposit came (R. II–137).

ARGUMENT

1. A Dr. Spaeth testified that petitioner Sanzo was in his office in Cleveland at the time of the robbery on August 14th (R. II–165, 169). He brought his "record card" with him but petitioner did not offer it in evidence (R. II–165). After inspecting the record card the Government offered it in evidence as its Exhibit 31 (R. II–167). The rubber stamped date "Aug. 14" had the second digit written over in ink (R. II–166). Without first obtaining the Court's permission, the United States Attorney had the record card flown to Washington, D. C., in F. B. I. custody for tests in the Government laboratories there (R. I–190–191). The next morning Special Agent Mesnig of the F. B. I. testified that by use of infra red photographs he had determined that the original date under the writing was August 18th (R. I–191–195).

There is no merit in petitioner Sanzo's contention that Mesnig's testimony should have been suppressed as wrongfully obtained.[2] Obviously,

[2] Petitioner Petro also makes this point in his brief but there is no light shed on how it can be said to bear on his appeal, as the testimony concerned only Sanzo's alibi.

no rights of privacy of petitioners or of any person were violated by removal of the exhibit without the permission of the court. The removal may have been improper, but it was not an infringement of a personal right to which the rule of suppression relates. The Court on learning of the overnight removal merely told counsel that either side would have been granted permission for removal if applied for, and later allowed petitioner to remove the exhibit for tests of his own, which were testified to on argument for a new trial.[3]

2. There is no weight in Petro's contention that reversible error occurred in the admission of testimony concerning the purchase of a cafe by his father for $46,000. Although petitioner had no interest in the transaction as such, the facts as to the purchase of the tavern were a necessary preliminary to prove a series of events connecting Petro with the robbery. The evidence showed that $500 of the money taken in the robbery, traced through serial numbers, was found to be part of the deposit on this purchase (R. II–135); that the hiding place for family savings from which Petro's mother obtained the deposit was frequented by Petro (R. II–137); that after the deposit had been made, Petro suggested to his father that he should obtain the return of the

[3] The Court found no conflict between the findings of the F. B. I. expert and those of the defense expert (R. I–351, 352).

$1,000 cash deposit made to the broker and substitute a check (R. II–110–111); and that an attempt to secure back the cash was made (R. II–111–112). The evidence in totality was clearly competent.

3. In the charge, the Court commented as follows on the identification of petitioner Petro by witnesses Addie Alden and Carter Alden (R. II–203):

> * * * At the time she viewed the line-up Mrs. Alden picked out Sanzo as the man seated next to the driver on August 14. She also picked out Petro, and her son Carter Alden picked Petro out of the line-up as the man who was the driver of the car on the morning of the robbery. Both of these witnesses identified Petro and Sanzo in this courtroom as the men they had seen on August 14th in the Oldsmobile car on Oak Knoll Road.

The record shows that Mrs. Alden picked out from the men numbered in the line-up numbers 1 (Sanzo) and 3 (Petro) as resembling the men in the car, and that she said number 3 was the driver of the car (R. II–37–39). She also picked them out in Court (R. II–39). Carter Alden testified that he picked out Petro from the line-up as the driver of the car and in Court he identified Petro again as the driver (R. II–4). The Court's comments as to Petro correctly reflected the testimony of the witnesses.

Moreover, the Court charged the jury that they were to rely on their own recollection of the testimony of the witnesses, disregarding the Court's statements if they were in conflict (R. II–197, 198). Since no objection was made by petitioner to the Court's comment, he is barred from predicating error upon it now. Rule 30, F. R. Crim. P.

4. After the Aldens had testified, F. B. I. Agent Peterson explained the manner in which the line-up was conducted and in the course thereof testified to the Aldens' identification of petitioners (R. I–86–88; R. II–77–82). Petro argues that such testimony was inadmissible hearsay since Mrs. Alden informed the police officer of her recognition of him in a low tone which he could not hear, and there was thus a lack of confrontation. Assuming this was hearsay, there was no objection raised and moreover, there was no prejudice since Mrs. Alden had already testified to the facts directly. Carter Alden's identification was heard at the line-up by Petro who said that he "didn't do anything" (R. II–22).

5. There is no merit in petitioner Petro's contention that reversible error was committed by the Court's failure to charge that "if the evidence as to him can be reconciled with either the theory of innocence or of guilt, the law requires that the defendant be given the benefit of the doubt and the theory of innocence be

adopted." The record shows that the court charged as follows (R. II–195–196):

> As is true in the case of direct evidence a conviction is warranted upon circumstantial evidence only when such evidence establishes the guilt of the defendants beyond a reasonable doubt. And a conviction on circumstantial evidence is not warranted unless the circumstances and the reasonable inferences to be drawn therefrom are inconsistent with the innocence of the defendants, and are such as to exclude every reasonable hypothesis except that of their guilt.

This charge, essentially that requested by petitioner, was correct. Cf. *Curley* v. *United States,* 160 F. 2d 229 (C. A. D. C.), certiorari denied, 331 U. S. 837; *McGuinn* v. *United States,* 191 F. 2d 477 (C. A. D. C.).

6. One Robert Igoe, who had testified that Petro was with him in Igoe's place of business at the time of the robbery, was asked on cross-examination why he had not come forward with this information to the police. The question does not appear in the transcript of record. A reference, however, is made to it in the Government's brief in the Court of Appeals which notes that no objection was made to the question. The argument that the question is not within the limits of proper cross-examination is frivolous.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

MAY, 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954